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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

15 NETWORK APPLIANCE, INC.
16 Plaintiff-Counterclaim Defendant,
17 v.
18 SUN MICROSYSTEMS, INC.
19 Defendant-Counterclaim Plaintiff.

Case No. C-07-06053 EDL

**PLAINTIFF NETAPP, INC.'S
OPPOSITION TO DEFENDANT SUN
MICROSYSTEMS, INC.'S *EX PARTE*
APPLICATION TO SHORTEN TIME
FOR HEARING ON SUN'S STAY
MOTION**

1 Pursuant to Civil Local Rule 6-3(c), NetApp, Inc. (“NetApp”) opposes Sun
 2 Microsystems, Inc.’s (“Sun’s”) *ex parte* application to shorten time for its stay motion [Docket
 3 35].

4 **I.**

5 **SUN’S EX PARTE APPLICATION SHOULD BE DENIED BECAUSE NETAPP
 6 DESERVES THE NORMAL TIME FOR OPPOSING MOTIONS AND THERE IS NO
 7 GOOD REASON TO DEPRIVE IT OF SUCH TIME**

8 Sun’s application to shorten time should be denied. Sun’s stay motion is
 9 recognized by all as a consequential motion that seeks to reshape this litigation and, in NetApp’s
 10 view, threatens to delay vital relief of real significance to NetApp and valuable clarity to the open
 11 source community. Given the stakes, it is particularly important that NetApp receive the normal
 12 amount of time to prepare its opposition to Sun’s stay motion. That opposition will require, not
 13 only the preparation of argument, but the substantial development of evidence, such as witness
 14 testimony, that warrants the normally allowed time. In addition, Sun’s proposal would
 substantially shrink the Court’s time to consider the parties’ briefing and evidence.

15 To justify this marked deviation from the normal rules, Sun argues only that
 16 shifting the hearing date by two weeks will somehow spare the litigation teams substantial work.
 17 However, during the two weeks that Sun proposes to “save” by this *ex parte* application, the
 18 parties owe no submissions to the Court. In fact, during that period, the parties are simply in the
 19 midst of a 43-day period for meeting and conferring on the disputed claim terms that they
 20 identified to each other on April 10. Surely the parties can meet and confer efficiently to
 21 minimize Sun’s concerns. In the end, the reality is that the litigation teams are very busy in their
 22 three cases and the supposed burden purportedly justifying this motion is in no way material.

23 In addition, any alleged burden caused by the normal May 20 hearing date stems
 24 directly from Sun’s own failures and should not now be used to provide Sun with tactical
 25 advantage on the stay motion by shortening NetApp’s time. Specifically, Sun failed to comply
 26 with elementary Patent Office filing requirements in all three of its reexam requests, causing them
 27 to have to be re-filed. If it had not made these errors, this motion could have been resolved
 28 already. The *ex parte* application should be denied.

1 **A. The Stay Motion Is An Important Motion Involving A Substantial**
 2 **Evidentiary Record And Warranting At Least The Normal Time Allocation**

3 As established in this section, Sun's stay motion is a consequential motion
 4 involving a substantial evidentiary record. NetApp brought this case due to Sun's brazen
 5 infringement of its patents through the use of key patented features of the NetApp products in its
 6 ZFS software. This infringement is particularly pernicious in that Sun is giving the infringing
 7 ZFS software away for free so that it can sell its other products and damage the market success of
 8 its competitors such as NetApp. Basically, Sun is attempting to damage seriously the market that
 9 NetApp pioneered with its industry leading data storage products. Declaration of Aaron M.
 10 Nathan in Support of NetApp, Inc.'s Opposition to Defendant Sun Microsystems Inc.'s *Ex Parte*
 11 Application to Shorten Time for Hearing on Sun's Stay Motion ("Nathan Decl.") at ¶ 13.

12 That Sun is exploiting NetApp's technology in ZFS is clear from Sun's own
 13 statements in which it essentially concedes it uses NetApp's patented WAFL technology. For
 14 instance in a paper entitled "The Zettabyte File System," Jeff Bonwick et al., write, "The best
 15 way to avoid file system corruption due to system panic or power loss is to keep the data on the
 16 disk self-consistent at all times, as WAFL does." Exh. A. (Bonwick et al.) at 4. Bonwick
 17 continues, "The file system that has come closest to our design principles, other than ZFS itself, is
 18 WAFL...[which] was the first commercial file system to use the copy-on-write tree of blocks
 19 approach to file system consistency." Id. at 11-12. Val Henson, co-author on the same paper, in
 20 a blog entry entitled "Cool systems paper: WAFL," writes, "In my opinion, [NetApp's WAFL
 21 paper] describes the most significant improvement in file system design since the original FFS in
 22 1978... The ZFS team thinks that a copy-on-write, transactionally updated general purpose UNIX
 23 file system is not only feasible but an excellent idea – which is why we wrote ZFS." Exh. B. at 3.

24 The parties arrived at this Court with this important case because they knew that
 25 this Court would diligently and effectively resolve their claims promptly:

26 Plaintiff believes in particular that having Judge Laporte preside
 27 over both of the parties' patent cases will lead to a just and speedy
 28 resolution of all of their disputes. Counsel for the parties have
 conferred with Judge Laporte, who has agreed to hear this matter
 and to conduct a prompt Case Management Conference with the
 goal of a prompt resolution of the disputes. The parties have

consented to have Judge Laporte hear this matter for all purposes[.]

Agreed Motion to Transfer at 1-2. *NetApp v. Sun* (9:07-cv-206 RHC, E.D. Tex.) [Docket 37].

Instead of keeping these claims with this Court for resolution, Defendant's stay motion is an attempt to reshape this litigation by slowing NetApp's pursuit of key patent claims by channeling them to a slower and less certain venue – even though the parties specifically requested this Court to resolve their claims. It is well-known that, for a variety of reasons, almost all requests to begin reexams are granted. *See, e.g.*, Corbett Decl. In Support of Sun's Stay Motion, Exh. D [Docket 39-5] at 1. Therefore, if motions for stay pending reexam were really as simple as Sun claims, virtually every defendant could grind its case to a halt using this tactic. Of course, the analysis is more complex than Sun lets on. In circumstances such as this, where timely resolution is so significant, such motions should be assessed even more critically.

NetApp deserves a full and fair opportunity to address these and other significant issues raised by Sun’s stay motion. NetApp will respond in its opposition to the many arguments made in Sun’s stay motion, including its many assertions about what happened in the reexams, its statistical analyses of the Patent Office in both *inter partes* and *ex parte* reexams, and its specific assertions that the delay caused by the extended stay it proposes will not cause NetApp irreparable harm. The opposition will thus require gathering evidence, lining up witnesses, and determining what witnesses and testimony should or should not be submitted on this motion. This process can be time consuming and it deserves—at a minimum—the normal time allotted to respond to a motion. NetApp would normally have until April 29 to respond to the motion. Slicing five days off that time, as Sun seeks to accomplish, is not warranted. Nathan Decl. at ¶ 15.

B. The Court Should Not Accept Sun's Claim That The Two Week Shortening Is Necessary To Avoid Prejudice To Sun

Sun seeks to move the stay motion hearing date by two weeks from the normal May 20 date to May 6. The theory of the motion is that speeding the hearing up by two weeks will avoid “prejudice” to Sun. *Ex Parte* Application at 3 [Docket 35]. Nathan Decl. at ¶ 16.

To prove prejudice, Sun portrays as substantial the alleged burdens that will be avoided by its *ex parte* application:

1 Between now and May 20 [the normal hearing date], the parties
 2 will meet-and-confer, exchange preliminary proposed claim
 3 construction and extrinsic evidence and prepare a Joint Claim
 4 Construction and Prehearing Statement...If the Court grants Sun's
 Motion to Stay on an expedited schedule, the parties and ultimately
 the Court will not have to address these claim terms at this time (or
 at all)."

5 Sun's *Ex Parte* Application at 3 [Docket 35].

6 This is not a fair characterization of the record. The exchange of preliminary
 7 proposed constructions and extrinsic evidence is scheduled to take place by April 30, *before*
 8 Sun's proposed hearing date, and the parties are required by Local Rule to meet and confer even
 9 before that. Case Management Scheduling Order [Docket 20] at 2; Patent L.R. 4-1(b). The Joint
 10 Claim Construction and Prehearing Statement is due on May 23, *after* the hearing would take
 11 place on the normal briefing schedule. Minutes to CMC in C-07-05488 [Docket 34]. Nathan
 12 Decl. at ¶ 17. In short, two of the events that supposedly prejudice Sun if NetApp's response
 13 time is not truncated *cannot* be avoided, because they will have occurred regardless, and the other
 14 could be avoided by a finding in Sun's favor at a hearing scheduled on the normal date.

15 What, then, is scheduled to occur during the allegedly prejudicial two-week
 16 period? Very little: The parties must continue to meet and confer based upon their April 8
 17 exchange of terms and their April 30 exchange of definitions. Nathan Decl. at ¶18. With three
 18 related cases of this magnitude, surely this meet and confer obligation will not materially affect
 19 the overall workload of the respective parties.

20 **C. The Timing Of Sun's Stay Motion Is A Product Of Its Own Failures**

21 Sun's original attempt to file reexams to pursue its stay strategy failed. Sun did
 22 not comply with basic filing requirements, which caused *months* of delay, creating the very
 23 circumstance about which it now complains.

24 On November 30, 2007, Sun filed its request for reexam of the '001 patent. Exh. C. On
 25 January 11, 2008, the PTO responded with a notice of failure to comply with *inter partes*
 26 reexamination request filing requirements. Exh. D. On February 8, 2008, Sun corrected its
 27 request. Exh. E. Sun filed its request for reexam of the '211 patent on December 14, 2007. On
 28 December 31, 2007, the PTO responded with a notice of failure to comply. Exh. F. On January

1 14, 2008, Sun corrected its request Exh. G. Sun filed its request for reexam of the '292 patent on
 2 October 25, 2007. Exh. H. On December 10, 2007, the PTO responded with a notice of failure to
 3 comply. Exh. I. On December 26, 2007, Sun corrected its request. Exh. J.

4 The requests actually accepted by the PTO as to the '001, '211, and '292 patents were
 5 filed approximately 70 days, 31 days, and 62 days, respectively, after Sun's initial non-compliant
 6 attempts. Nathan Decl. at ¶ 19. Because the reexams were granted for those same patents on
 7 April 7, April 2, and March 18, respectively, subtracting the delay caused by Sun's own failures,
 8 the reexams might have been granted on January 28, March 2, and January 16, respectively.
 9 Assuming that Sun would wait, as it did here, until eight days after all three requests were granted
 10 before filing its motion, it could have filed its motion by about March 10.¹ This would have
 11 resulted in a hearing date of April 14, 2008, one day before Sun finally managed to file its actual
 12 motion. Nathan Decl. at ¶ 20. Had Sun complied with basic PTO procedure, Sun could have had
 13 a hearing roughly 22 days before the expedited hearing it now requests, and without needing to
 14 shave off a single day of NetApp's rightful time to respond or of the Court's time to consider the
 15 briefing. Therefore Sun's purported hardship is caused by its own failures.

16 NetApp respectfully requests this court to deny Sun's *ex parte* application.

17 Dated: April 18, 2008

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¹ If time were really of the essence for Sun, presumably Sun would not have waited until all three requests had been granted before seeking a partial stay.